

THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Association Activities

AT THE ANNUAL MEETING of the Association, held on May 10, the following officers and members of committees were elected:

PRESIDENT

Allen T. Klots

VICE PRESIDENTS

Sherman Baldwin

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Eli Whitney Debevoise

Samuel I. Rosenman

James Garrett Wallace

SECRETARY

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EXECUTIVE COMMITTEE

Class of 1959

Henry C. Blackiston

A. Fairfield Dana

S. Pearce Browning, Jr.

Phillip W. Haberman, Jr.

COMMITTEE ON ADMISSIONS

Class of 1958

Irving M. Engel	James N. Hyde
David F. Freeman	Walter R. Mansfield
Gerard Swope, Jr.	William Shields, Jr.
Lyman M. Tondel, Jr.	

COMMITTEE ON AUDIT

Dana C. Backus	Melbourne Bergerman
Chauncey B. Garver	



AT THE ANNUAL MEETING, upon recommendation of the Committee on the Judiciary, Whitney North Seymour, Acting Chairman, the following resolutions were adopted:

WHEREAS, Justice William C. Hecht, Jr. has completed a full term as a Justice of the Supreme Court, New York County, and has filled that office ably and conscientiously and has made many contributions to the improvement of the administration of justice in the Court; be it

RESOLVED, that in the opinion of this Association, Justice Hecht is entitled to the nomination of all political parties so that the public may continue to enjoy the advantage of his service as a Justice of the Supreme Court.

WHEREAS, Judge James M. Barrett has completed two full terms as a Judge of the County Court, Bronx County, and has filled that office ably and conscientiously; be it

RESOLVED, that in the opinion of this Association Judge Barrett is entitled to the nomination of all political parties so that the public may continue to enjoy the advantage of his service as a Judge of the County Court.

The Committee on the Domestic Relations Court, Maurice

Rosenberg, Chairman, presented the following resolutions which were adopted:

WHEREAS, Judge Hubert T. Delany has served as a Judge of the Domestic Relations Court since 1942 and has rendered distinguished service as a Judge of the Court; be it

RESOLVED, that Judge Delany is outstandingly qualified to hold the office of Judge of the Domestic Relations Court; and be it

FURTHER RESOLVED, that this Association recommends to Mayor Wagner that Judge Delany be re-appointed as a Judge of the Court.

WHEREAS, Judge Justine Wise Polier has served as a Judge of the Domestic Relations Court since 1935 and has rendered distinguished service as a Judge of the Court; be it

RESOLVED, that Judge Polier is outstandingly qualified to hold the office of Judge of the Domestic Relations Court; and be it

FURTHER RESOLVED, that this Association recommends to Mayor Wagner that Judge Polier be re-appointed as a Judge of the Court.

Elsewhere in The Record is an account of the presentation of the Association's Medal to Mr. Harrison Tweed.



A MEMORIAL MEETING in memory of the late Judge Augustus Noble Hand was held at the House of the Association on May 4. Speakers were: Chief Judge Charles E. Clark and Judge Charles E. Wyzanski, Jr. The meeting was sponsored by the Association and the New York County Lawyers' Association. The remarks of

Chief Judge Clark and Judge Wyzanski will be published later and made available to the members of the Association.



THE PRESIDENT and Whitney North Seymour, Acting Chairman of the Judiciary Committee, gave the following statement to the press on the appointments of J. Edward Lumbard and Sterry R. Waterman to the United States Court of Appeals, Second Circuit, and William B. Herlands to the United States District Court for the Southern District of New York:

"President Eisenhower and Attorney General Brownell are to be congratulated on the appointments to the Federal Courts in this Circuit which have just been announced. J. Edward Lumbard will bring to the Court of Appeals extraordinarily broad experience as lawyer, trial judge and public servant. He is now serving with real distinction as United States Attorney for the Southern District of New York. We are familiar with Mr. Waterman's qualifications. He has had extensive trial experience and his long service as one of the Commissioners on Uniform State Laws has given him a comprehensive and scholarly grasp of many legal fields. Mr. Herlands is well equipped for service on the District Court, with his varied professional experience as lawyer, investigator and in many forms of outstanding public service."



THE COMMITTEE on Legal Aid, Woodson D. Scott, Chairman, held the final meeting of its year at the Columbia University Faculty Club. Preceding the meeting the Committee inspected the Harlem Branch of the Legal Aid Society. Following dinner, brief remarks were made by the President of the Association, Dean Warren of Columbia Law School, Timothy Pfeiffer, former President of the Legal Aid Society, and Commissioner

Caroline K. Simon, Chairman of the Legal Aid Committee of the New York County Lawyers' Association.



THE COMMITTEE on State Legislation, A. Fairfield Dana, Chairman, printed formal reports on 130 bills introduced in the Legislature in seven published bulletins of the Committee. The committee also printed 55 reports prepared by other committees of the Association. This year the Committee enjoyed having exceptional cooperation from the Governor's Counsel, The Honorable Daniel Gutman. At the request of Judge Gutman the Committee prepared reports on over 250 bills, making a total of some 234 letters to the Governor's Counsel.



ON MAY 3 Governor Harriman approved legislation establishing a Judicial Conference for the State of New York. Mr. Tweed, Chairman of The Temporary Commission on the Courts, issued at that time the following statement:

"Governor Averell Harriman, in signing the Judicial Conference Bill today, brought to its culmination a striking example of bi-partisan work for the good of the public. Through the efforts of statesmanlike men of both parties, New York now has a law providing for more businesslike administration of its courts—the first such provision to be made in the history of the State.

"The bill, introduced by Senator John H. Hughes, Republican, of Syracuse, and Assemblyman Leonard Farbstein, Democrat, of New York, both members of the Commission, was passed by the Legislature with large majorities in both houses. Senator Walter J. Mahoney, Majority Leader of the Senate, and Speaker Oswald D. Heck, and Majority Leader Joseph F. Carlino in the Assembly, representing the Republican majority, all worked together to bring this reform about. The bill also received strong support from the Democratic minority led by

Senator Francis J. Mahoney, Minority Leader in the Senate, and Minority Leader Eugene F. Bannigan in the Assembly.

"On behalf of The Temporary Commission on the Courts I wish to express sincere appreciation to all of these public leaders for their efforts. At the same time, I wish to express the Commission's appreciation to the many citizens of New York who helped formulate this law by devoting their time to attending public hearings on the measure and their thought to suggestions which were aimed at improving it."



COMMENT ON the debate, "To Return Or Not To Return, That Is the Question," sponsored by the Committee on Foreign Law, Willis L. M. Reese, Chairman, was recorded in German for broadcast by The Voice of America by Otto C. Sommerich, Chairman of the subcommittee which arranged the debate. Participants in the debate were Rudolf M. Littauer, member of the Bar of the State of New York, who spoke in favor of the return of the confiscated German property, and Cecil Sims, member of the Bar of Nashville, Tennessee, who spoke in opposition.



A SUCCESSFUL Forum on "What's Happening in the Insurance Business" was sponsored by the Committee on Insurance Law, Wayne Van Orman, Chairman. Edmund T. Delaney was Chairman of the subcommittee which arranged the Forum. Speakers were: H. Clay Johnson, Executive Vice-President and General Counsel of the Royal Liverpool group; Joseph A. Newmann, President of the National Association of Insurance Agents; Henry Moser, General Counsel of the Allstate Insurance Company; Franklin J. Marryott, Vice-President and General Counsel of Liberty Mutual Insurance Company; and Monroe Maltby, Vice-President of Johnson & Higgins.



JUDGE LAWRENCE E. WALSH, Judge of the United States District

Court for the Southern District of New York, was the guest of the Committee on Admiralty, William G. Symmers, Chairman. Judge Walsh discussed calendar practice in admiralty cases.



GERALD J. MC MAHON, Acting Secretary-General of the International Bar Association, has announced that the Executive Council of that Association has accepted the invitation of Den Norske Sakførerforening to hold the Sixth International Conference of the Legal Profession in Oslo, Norway, from July 23-28, 1956. Members of the legal profession planning to attend the Conference are urged to make their hotel and travel arrangements well in advance of the meeting.

The International Bar Association is a federation of national bar associations, and individual members of the legal profession are eligible to join as Patrons contributing \$25 annually. Further information is available on application to the Acting Secretary-General, Gerald J. McMahon, 501 Fifth Avenue, New York 17.

The Calendar of the Association for June

(As of May 16, 1955)

- June 1 Dinner Meeting of Special Committee on Antitrust Laws
and Foreign Trade
Luncheon Meeting of Committee for Modern Courts
- June 2 Luncheon Meeting of House Committee
- June 6 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Professional Ethics
- June 7 Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and
Trade Marks
Meeting of Committee on Young Lawyers
- June 8 Dinner Meeting of Executive Committee
- June 14 Meeting of Judiciary Committee
- June 15 Meeting of Committee on Admissions
Dinner Meeting of Committee on Municipal Court
- June 21 Adjourned Annual Meeting of Association, 5 P.M.

The President's Letter

To the Members of the Association:

I hardly need tell you how honored I am that you should have elected me for another term. Such an expression of confidence is a most comforting experience.

This has been a very exciting year for me. I do not believe that anyone who has not held this job can have any conception of the multitude of problems that from day to day come across one's desk, over one's telephone and through committee meetings, and the time and thought required to deal with them even in the most pedestrian way. But it is through them that one feels the pulse of this very vibrant organization and it is a very stirring experience.

Best of all, this year has meant to me the opportunity to make so many new and valued friends, and the good will and unfailing support that you have given us in all our efforts has made this task a most pleasant one.

Last year on the occasion of my election I stated that it was only in the faith which one had in the help and support of our committees and the staff of the Association that one could hope to carry on at all. The faith has been more than justified, and I shall never cease to be grateful for the loyalty and support which we have received from them. Our committees have risen to every occasion. I shall never fail to be thankful for the advice and helpful counsel so generously given by my predecessors in office to whom I so often turned for advice.

I am grateful to you for continuing in office our Treasurer. I hope that you all realize what an exacting and time-consuming task is his and how beautifully he performs it. No administration of this Association could ever hope to function without such a loyal and intelligent contribution as is made by George Spiegelberg.

We are sorry to lose our Secretary, Bill Jackson, who has so faithfully adorned that office these past years and to whom we

are indeed grateful for his conscientious and efficient discharge of those duties. We welcome Mandeville Mullally, our new Secretary.

There is no reason to believe that the coming year will be less exciting. There are many jobs left undone and many new problems will undoubtedly present themselves. We shall do our best not to let you down and to leave a few milestones along the way.

ALLEN T. KLOTS

May 18, 1955.





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Mr. Tweed Receives The Association's Medal

At the Annual Meeting of the Association on May 10 the Association's Medal was presented by the President to Mr. Tweed. In making the presentation Mr. Klots said:

"Four years ago the Executive Committee of this Association established an award, to be presented in the form of a medal, to a member of the New York Bar for 'exceptional contributions to the honor and standing of the Bar in this community.' This award was to be made on rare occasions and was conceived as a recognition for achievements which were inspired by a sense of obligation to peculiarly professional responsibilities and by a sense of a lawyer's duty as a citizen and a member of the community.

"Rarely shall we find a candidate who so well fits the very conception and purpose of this award as the man whom we are to honor this evening. Surely nothing serves to contribute more effectively to the honor and standing of the profession than repeated response to calls for service and leadership in fields where the Bar has peculiar responsibility for leadership. The career of Harrison Tweed is a record of devoted service in answer to just such calls.

"Legal Aid is, perhaps, the outstanding example of service which recognizes in the highest degree our profession's obligation to society. Over twenty years ago Harrison Tweed first became identified with this activity when he was appointed Chairman of

Editor's Note: The obverse of the medal bears an adaptation of the Association's Seal: A full length figure of Athene in her special, and to the Greeks, favorite, character of Polias, the guardian of the city, bearing a scroll in her right hand and a winged Victory in her left. The figure is a slightly idealized reproduction of the statue ascribed both to Pheidias and to his contemporary, Praxias, the original of which is now in the Villa Albani, near Rome. On either side of the main figure is a legend from the fourth book of Aristotle's Politics, concluding a sentence which reads, "Where the laws are not enforced there can be no free state, for it is essential that the law be supreme." At the foot of the figure is inscribed the characteristic title Polias, and around the seal is the corporate name of the Association, with the date of its organization, 1870. The medal is the work of the American sculptor, C. L. Schmitz. The medal has been awarded previously to Robert P. Patterson and C. C. Burlingham.

this Association's Committee on Legal Aid. Since then his whole career has been enriched by sustained and unremitting devotion to this cause. He became and served for nine years as President of the Legal Aid Society of New York until it became, as it remains today, the outstanding endeavor in this field in the country—indeed, in the whole world. As Chairman of the Legal Aid Committee of the American Bar Association his service in this field was extended to become a nation-wide influence and today he continues to be the first President of the reorganized National Legal Aid Association.

"The American Law Institute is an institution in which the Bar of the whole country recognizes its duty to contribute its professional skill in another field peculiarly within its competence, that is to say, the advancement of jurisprudence and legal science throughout the nation. As President of the American Law Institute, Harrison Tweed for eight years has devoted his talents to the vital cause of reshaping the substantive law by which our complicated society is governed.

"And now, as Chairman of The Temporary Commission on the Courts, he is giving his sensitive and statesman-like leadership to the all-important cause of modernizing the whole machinery of justice as it is administered in this Empire State.

"But to us assembled at this meeting, his distinction and achievements which affect us most intimately came as President of this Association. Possibly it was the spirit of his grandfather, William Maxwell Evarts, the first President of this Association and the only other President holding that office for three years, which inspired the imagination and genius that characterized his administration. During those three years this Association was reincarnated so that it became the completely unique institution which it is today. It was Harrison Tweed who determined to give meaning to the fourth purpose expressed in our charter, namely, 'of cherishing the spirit of brotherhood among its members,' so that today the Association has all the attributes of a most agreeable social club with a unique diversity of interests and activity—affording an outlet for a variety of talent in such fields as those

of entertainment, art, the theatre and education, to say nothing of conviviality. At the same time he instilled new life and impetus in those activities designed to carry out the other express objectives of our charter which recognize and seek to implement our professional responsibilities as members of the Bar.

"So much for what we might call curricular activities which only a lawyer is qualified to perform. But while doing all these things he has found time to serve in such extra-curricular offices as Overseer of Harvard College, Chairman of the Board of Trustees of Sarah Lawrence College and Trustee of Peter Cooper Union, thereby further lending distinction and honor to his profession.

"To do all these things is achievement enough for any man. To do them all with distinction is a test of quality. But to do them merrily and with a spirit so contagious as to infect all who come within its aura is a gift which the gods themselves bestow with jealous rarity.

"It is my great privilege, Harrison Tweed, to bestow upon you by order of the Executive Committee of this Association, the Association's Medal for 'exceptional contributions to the honor and standing of the Bar in this community.'"

In accepting the Medal Mr. Tweed said:

"The members of this Association have been altogether too good to me from beginning to end. The record of the way in which I have expressed by appreciation is something of which I should be very much ashamed. By beginning I mean the night, almost exactly ten years ago, when you did me the honor to elect me President. Because, if the truth be told, I had done nothing in or for the Association prior to that time except to be Chairman of the Committee on Legal Aid. There was really only one man who thought I ought to be President, but he is one who almost always gets his way. It is a coincidence that C. C. Burlingham was a recipient of this Association's Medal—not for getting me elected, but for the many things that entitled him to the honor.

"The way in which I showed my gratitude for the honor done me was to proceed to spend half a million dollars of your hard earned surplus and then, with an effrontery of which I shall always be ashamed, to let it be known that I wanted a third term in the hope that I could find some more money to spend. You were generous enough to humor me—perhaps because you knew that there was no money left anyway.

"Seven years ago, when my term was over, the Committee members gave me a sumptuous dinner, at which that great man Robert Patterson presided. There were fat and juicy steaks. I acknowledged the tribute by getting a piece of one of them stuck in my gullet so that for a couple of hours I could neither eat nor drink. This did not bother me much because it is an old parlor trick of mine, but it was very disconcerting to my hosts. Again you were patient and forgiving.

"Then you consented that I be Chairman of the House Committee, in which capacity I was able to wring a few thousand dollars from good-natured treasurers for the Cromwell, Byrne and Grievance Committee Rooms. You still tolerate me as a member of the House Committee although Ex-Treasurer Garver has been substituted as Chairman and is much less of a spendthrift. However, we have a project now to improve the lighting in the library reading room and perhaps to remodel the west end of it with comfortable chairs and special reading facilities so that the membership may find working there a little pleasanter.

"You made me your guest of honor at the First Twelfth Night Party and what did I do but subject you to the agony of hearing me sing a song. You graciously and generously—and ill-advisedly—asked me to give this year's Cardozo Lecture and I promptly sought sanctuary in a hospital and asked for a postponement until next fall.

"And now tonight you have done me this greatest honor of all—and the most undeserved. For it clearly is undeserved. I have never been able to understand why a man should receive honors or even commendation for doing what he wanted to do and enjoyed doing. My first boss, James Byrne, who punished himself

harder in practice and as President of this Association and in many other positions than any man I ever knew, used to say that every lawyer should spend part of each day doing something he loathed. Byrne did just that but he never succeeded in persuading me to. The time that I spent on Association matters and in doing the other things which President Klots has mentioned was spent because that gave me more fun than anything else that I could think of. So I feel quite undeserving of medals or even kind words.

"I cannot mention the name of James Byrne without saying that if it had not been for him this Association would have been bankrupt long before I spent that half million dollars. For it was he who, with blood and sweat and tears, persuaded the Association and raised the money to build the Bar Building, from which we have received substantial annual revenue ever since. It is to him that we owe the fact that this Association is about the only organization in the country which has not raised its dues in over thirty years.

"Any such medal as this—at least when bestowed on any one such as me—should have within it a tablet for the inscription of the names of the men and women whose hard work and unselfish devotion made it possible for the recipient to indulge in the things he liked to do and then be medalized for it. They are the really deserving souls because much of the work they do is quite unpleasant and entirely unappreciated. I consider that I hold this medal in trust for the benefit of all of those who enabled me to get it.

"That thought prompts me to say what I have repeatedly said in recent months that the only action as Chairman of The Temporary Commission on the Courts for which I really deserve credit was persuading Frederick Bryan to become Chief Counsel. He has been unbelievably versatile and valuable. Obviously, I cannot claim credit for the selection of Vice-Chairman Louis Loeb and the other nine members of the Commission, although I should be proud to do so. A better group for the duties assigned them could not have been selected, and that includes, of course,

both those appointed by Governor Dewey and those appointed by the legislative leaders, two from the Senate and two from the Assembly.

"Turning to this Association, I think that the one constructive thing I did as President, other than to get a lot of new piping and wiring and fire escapes into the walls, was to find Paul DeWitt and install him as Executive Secretary. But the greater part of the credit for that goes to Bethuel Webster, who saw him first.

"I should like to go back for a moment to the Annual Meeting of ten years ago. A long tradition required that the President should be elected with great formality but that he should not be heard from or even seen. It was regarded as appropriate and obligatory that he be somewhere else. I insisted upon turning up and making a speech. It was not a very good speech but I have often thought that it was the best one I ever made. I should like to quote from it. I said then wholeheartedly, and I repeat today wholeheartedly, that 'I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with, than any other variety of mankind.'

"As I have wandered about this country in the last ten years I have become convinced that the members of this Association represent the very best in the profession.

"In that same speech I was uncomplimentary about bar associations. I said: 'Bar associations, instead of breeding courage, breed timidity. They acquire an introspective point of view. There is a turning inward instead of an outgiving. They tend to gratify their members rather than do something for the community.'

"I am glad to say that so far as this Association is concerned that simply is not true today. President Klots and his predecessors—Presidents Webster, Seymour and Patterson—have made their objective the public welfare and seen to it that in working to that end the Association has discarded the traditional conservatism of the Bar, has judged each issue on its merits and frequently has had the courage to take a minority position.

"On this occasion of your final mark of friendliness and good will, I have been behaving as badly as ever. First, in arousing unjustified sympathy by getting myself a case of pneumonia, and now by letting the doctor limit me to a very brief appearance tonight. His orders are that I go home immediately. I am sorry, for annual meetings are pleasant occasions and they come but once a year. More than that, my departure might seem to indicate a lack of appreciation. I hope you will believe me that I go reluctantly and that my heart is very full of sincere gratitude to the members and officers of this Association."

The Changing Role of the Corporation and its Counsel

By ADOLF A. BERLE, JR.

Returning from World War II, the Faculty of the Columbia Law School authorized the creation of a seminar, inaccurately and undescriptively called, "Advanced Problems in Corporation Law." For the last seven years this seminar has concerned itself with the corporation as an institution, and with various aspects of its singular role in American life. Necessarily the house counsel or lawyer directly employed in the organization of the corporation changed his functions and position as the organism in and for which he worked gradually shifted from a method of conducting private business to a quasi-public institution on which the country had come to rely for certain services in peace and in war. Dean Warren will discuss presently the individual position and status of the corporation counsel. I wish merely to project some considerations as to the fields in which he is becoming increasingly influential.

Before leaving him as an individual, one observation can not be forbore. His history is much like the history of priest or clerk who found himself in the councils of the combined government and economic organisms which were dominant in the feudal period. Our deepest roots in Anglo-American law are based on the work of these men. In feudal England the principal economic activity of the country was agriculture and ultimate responsibility for its handling lay with the feudal barons or lords. There was no doctrine those days that government must be separate from business or vice versa. It was all one complex and

Editor's Note: Mr. Berle delivered the paper published here before a joint meeting of the Section on Corporations, George A. Brooks, Chairman, and the Section on Corporate Law Departments, E. Nobles Lowe, Chairman. On the same program Dean William C. Warren of Columbia University Law School discussed the individual position and status of the corporate counsel.

the little council of men in the feudal lordship ran it all. Commonly one man in the lot was a priest or a clerk. He was there primarily because he alone could read and write—and this was probably why they had him. But he also represented an outside point of view—that of the Church. His advice and views therefore commanded respect. As record-keeper and custodian of the written word he could ascertain the facts. As representative of the detached viewpoint of the medieval Church, his philosophical, ethical and even legal views were at least listened to if not actually sought. Somewhat the same thing is true today as corporate organizations grow to power. The house counsel is still, usually, the only man in the lot who can read or write—as any lawyer who has had to go over corporate records kept without benefit of counsel knows to his dismay and sometimes to his sorrow. As lawyer, he can and, indeed, must express his opinion—whether or not it is asked—on what a judge may think of a transaction on which he is working, should it ever get into court. The priests or clerks attached to the greatest feudal lord of them all—the king—in time became Chancellors. Lesser clerks entered, in one way or another, into the law, making law-giving processes, reducing a system which might have been semi-oriental absolutist anarchy into the legal-economic system we have today in the Western world. The house counsel a generation or more ago was regarded almost with contempt—he was the “tame” lawyer whose standing was lower than the supposedly free, independent practitioner. Few students of the corporate picture would today make so invidious a comparison.

Because the revolution churning the corporate system is enormous, only a few major aspects can be indicated here. They will perhaps prove the point.

I

CONCENTRATION

The galloping industrial revolution comprehended within the lifetime of the older men here present (say, 1900 to 1955) in eco-

conomic aspect has been perhaps more profound than any peaceful revolution in recorded history. At the turn of the century the United States was a country in which enterprise was typically individual, though certain great enterprises such as railroads had begun to over-pass the minds and wills of any individual and even of any small group of individual associates. Half a century later, except in agriculture, productive enterprise is not merely typically corporate and collective. A large majority of it is administered by very large corporations. Let us accept the estimate of Professor M. A. Adelman of Massachusetts Institute of Technology—though I consider it rather deceptively conservative. In terms of actual assets owned, 135 corporations own about 45% of all the manufacturing assets of the United States (manufacturing being substantially everything except banking and finance and transporting). If you increase the figure to, say, 300 corporations you list, there, the ownership of perhaps two thirds of the manufacturing of the entire United States, or rather more than one-quarter of all manufacturing assets of the entire world. The feudal age in its greatest period never achieved anything like this.

Clearly the corporate form, *per se*, tells nothing. All of us have known, and have organized, corporations which were, for all practical purposes, legal clothes for individuals. These, and concerns like them, may continue to be individual forever; they may grow, attaining an intermediate status, again familiar to us all. As they succeed, the time comes when they must either shrink, grow into full public status, or be absorbed into larger quasi-public organisms as is happening today under the plethora of mergers with which we all are familiar. There is no point here in endeavoring to define the point at which a private and individual enterprise, though corporate in form, enters the class of a quasi-public economic institution. We all know it happens. Commonly it acquires house counsel at or about this time.

For those who are interested in economic effect, the results are rather more striking. A series of figures worked up for me showed that from 1919 to 1947 the total capital formation of the United

States was about 870 billion dollars. (Today it would probably be more than one thousand billion dollars.) Of this figure, 34% was generated from what today we call "internal" sources—that is, earnings of corporations which were not distributed as dividends, together with operating profits withheld as depreciation funds and so forth. 40% of the fund was—believe it or not—bank credit. Perhaps it ought not to have been; World War II seems to have been largely responsible for the process. But of this bank credit which went to capital use, a very large slice was granted to and applied by the larger corporations. In recent years the process has not slowed up. Capital generated by corporations from withheld earnings and so forth today runs at the rate of rather more than six billion dollars per year; this takes no account of additional billions which growing corporations draw from private savings.

This still leaves a respectable portion of capital formed by private thrift and savings. Some of it is forced saving—the Social Security funds of the United States, the growing pension trusts, and a certain amount taken directly by education and applied through governmental channels to capital use. But private thrift builds up chiefly through the great fiduciary institutions, notably life insurance companies. There again the 15 or 20 largest corporations collect, receive and hold the capital derived from private thrift; they see to its application and it will surprise no one here to learn that next to housing the largest field of application is the capital needs of substantial corporations.

The point, of course, is that the large corporations not only have a dominant position in actual manufacture. They have at the moment the dominant position in applying the capital formation of the country to development. In the aggregate, the groups which apply capital to development determine (at least in physical and economic aspect) the kind of country you will have.

Lawyers, at this point, will remember a classic litigation in Michigan in 1917. Mr. Henry Ford and a partner, Mr. Dodge, had built the Ford Motor Company—small by present standards but large by the criteria of a generation ago. Mr. Ford was for

plowing back profits. He was already paying dividends of 100% per year on the capital originally invested in the enterprise. He dreamed of his corporation doing three things: integrating the industry (buying mines and immediate suppliers) and so forth, and of making it a social factor, providing housing, schools and ways of life for his employees; and as a public economic factor, providing Ford cars at the lowest possible price so that the benefits of automobile use might be priced within reach of everyone. Mr. Dodge considered that plowing back profits to realize these dreams was "unreasonable" withholding of dividends and he brought action to compel the declaration of dividends from past and present profits thus retained in the company. A Michigan judge listened respectfully to Mr. Ford's elaboration of his combined business, economic and social dreams. One suspects that astute counsel for Mr. Dodge encouraged him to expand. The Michigan courts pondered the case and decided: that in so far as Mr. Ford's dreams had a "business" basis, they would not upset the presumption that the corporation's board of directors knew its business best. They were distinctly sceptical about the right of a board of directors to indulge large ideas about influencing the economy of the country and therefore steering for a low price, low profit margin product. As for Mr. Ford's social dreams, they, of course, had no place at a directors' table. This introduced the idea of philanthropy and other concepts alien to the hard-boiled business of taking other people's money, making profits with it, and seeing that the profits went back to the owners. So they decreed additional dividends. Thereupon Mr. Ford bought out Mr. Dodge (he later organized the Dodge Motor Company, still later to become the Chrysler Corporation, and it is now with us in that form). The Ford Motor Company then went on its way to become one of the very few titanic enterprises which still is individually owned and controlled. The irony of history led the corporation directly into its ownership by a philanthropic foundation—the Ford Foundation—and to the non-statist socialization of more than one-third of the automobile industry of the United States.

But how many of us here, reading *Dodge v. Ford Motor Company*, would take it as precedent today, or would predict that a court in 1957 would come up with the same result as did the Michigan court in 1917? Indeed, how many stockholders in United States Steel Company or Standard Oil of New Jersey would commence a stockholder's action to compel larger dividends basing their case on the brilliant speeches of Mr. Irving Olds (formerly Chairman of the United States Steel Company) or of Mr. Charles Abrams (formerly a director in Standard Oil of New Jersey), demanding that corporations recognize their social duties to general education including the humanities? How many lawyers in 1917 would have forecast the passage of a statute such as that which was upheld by the New Jersey Supreme Court in *Barlow v. A.P. Smith Manufacturing Company*, or would have risked their reputations on an opinion that such a statute was constitutional?

The point, of course, is simple. Combination to a high degree of concentration, the obviously growing factor of power, and the clear reliance of the community on these institutions, in forty years pushed them out of the class of private business, and certainly out of the class of "individual initiative" into a field in which, though non-statist, they are institutionally a part of the political life of the country. "Political" is here used in its Greek sense, connoting the organization of power rather than its more modern sense of organization of the state.

II

But we are not allowed in this onrush of history even to accept the sharp distinction between private business on one hand and the political state on the other. Perhaps it would be better if we were conceded this good fortune. I can imagine a time coming in which there will be insistence on separation of business and state, just as we insist on separation of church and state; or perhaps, if you please, on a doctrine of separation of powers wherein we not only require separation of executive, legislative and

judicial power, but add a fourth category—separation of economic administration as well. But for the time being at least I doubt if the doctrine of separation of powers will be extended in either of these senses. Historically, so far from separation, the modern corporation is actually being drawn into relation with the political state. In fact, more often than not, it pushes for, demands and insists on that relationship. The fact is that the greater part of American productive activity, in this Republican year of 1955, is covered, directed and guided by a national plan or procedure for the industry. In extreme phases, it is almost impossible indeed to separate the government from the industry.

Only the bare outline need be given here. Historically, of course, the utilities and transport industries were subject to regulation, chiefly local. It is not surprising, therefore, that the first attempt at national planning was for railroads as the nascent Interstate Commerce Commission Act of 1887 began to be developed towards actual national control under the impetus of a famous subversive by the name of Theodore Roosevelt, and gathered additional headway as it went along. Nor is it surprising that the electric light and power industry slowly came into national cognizance and under national planning using the unlikely nucleus of federal control over the water-power resources of public lands and over navigable rivers. Indefensible financial excesses of the 1920s created the inevitable head-on collision between the industry and the community. The era of Franklin D. Roosevelt, the public development projects of the Tennessee Valley, the Columbia basin, the Colorado basin, and now of the St. Lawrence, form one part of the complex. The combined functions of the Federal Power Authority and the Public Utilities Holding Act administered by the Securities and Exchange Commission, fill in the broad outlines of the picture. The utilities industry has not been skillfully or sensitively managed, and the conflict is still going on.

But, simultaneous with the power plan, the oil industry—no public utility, that—insistently demanded the so-called “proportion” plan which governs today. Built on the misery attendant

on over-production, local plans were attempted and failed. Something like an acceptable national plan was cobbled up in 1934 as an industry code under the NRA; and when Justice Harlan Stone held that act unconstitutional, immediate steps were taken. One was to put into effect an interstate oil compact or treaty between the states calling for pro-ration of production; this was designed to adjust production to an estimate of consumption provided by the Department of Interior. Interstate shipments of oil not certified under the plan were made federal offenses under the Connolly "Hot Oil" Act. We also have had the adjustment of the sugar situation through the Sugar Adjustment Act of 1947. We have had an unsuccessful plan forecast by the Stockyards Act of many years ago. Our aviation industry has, from the beginning, been maintained under federal plans, the present Civil Aeronautics Board being, of course, the keystone of that particular arch. Almost by hypothesis radio and television had to be developed under a national plan; the very nature of air waves requires traffic control, allocation of bands, and adjustment of the unlimited capacity to produce sounds over radio transmitters to the limited capacity of air waves to carry the noise (more or less intelligibly) to your radio set. Even primary materials such as aluminum, copper and, within narrow limits, steel, are similarly influenced—to a high degree in the case of aluminum and copper; to a less degree in the case of other materials.

And when we survey the scene in the more modern industries we find almost inseparable relation between the political state and the industrial enterprise. The aircraft manufacturing industry is rightly regarded as one of the great industries of the country; but 90% of its product goes to the United States government. The facilities are partly privately owned; partly governmentally owned but leased to private institutions; partly governmentally-owned outright. The electronics industries are so entangled with processes worked out and owned by the government for purposes of defense, and with experimental orders whose primary motivation is military but whose by-products are unlimited, that some rationalization of the system will have to

take place in the not too distant future. The spectacular new field of atomic energy is, of course, for the moment entirely within the plan and control of the Atomic Energy Commission. This does not exhaust the list. The point is, quite simply, that without benefit of dogma, the combined necessities for defense, for development, for community stability, and even for orderly international affairs, demand a high degree of planning in which governmental power must enter. Sometimes the community demands the exercise of this power. Historically, the industry has demanded a partnership no less freely. In either case, the large corporations in the particular field involved emerge not only as economic units but as quasi-political institutions as well. They are judged not merely by the narrow standards of the balance sheet and business criteria, but by the larger and more diffuse standards which a community applies to its public administration.

III

Two considerations arising from this fact are worthy of emphasis here.

First are the legal considerations which we are only beginning to study. My own view, argued in various Law Review articles and elsewhere, is that a corporation, especially in some national industrial planning complex, is subject to the same constitutional limitations as those applicable to a branch of the federal government or of the state government. The United States is not, I think, and hope, likely to socialize its production. But it gives every indication of constitutionalizing the corporation.

Heretofore corporations have not wished this. Today, however, in certain respects many of them want it badly indeed. The General Electric Corporation recently had a brush with a Congressional Committee headed by Senator McCarthy. He wished a number of people thought by him to be Communists to be permanently excluded from certain factories. This, of course, is in the nature of a penal operation, and our Constitutional law has, rightly, thrown all sorts of safeguards around the imposing

of penal consequences for human action. As the situation emerged, apparently, the General Electric Corporation was expected to be judge, jury and executioner and, for better or worse, finally accepted the role. But in justice to that very great corporation it did not like the role at all, and said rather plaintively that this was a field which should be covered by federal legislation. In my own view it is already covered by the Bill of Rights which binds the General Electric exactly as it would bind the Department of Justice or the Interstate Commerce Commission.

It is the task of the house counsel of organizations of this kind to judge precisely the legal implications of these emerging situations; even better, of course, to be sensitive to them, to forecast their possibility, and to deal with them before they come up. I do not know of any statute which forbids a great oil company from announcing as a policy that gasoline shall not be sold to Negroes at the gas stations it controls—though the control is more often by contract than by direct ownership. Yet I surmise that any sane house counsel would tell any board of directors ill-advised enough to attempt such a policy that they could not make it go down. If, at long last, the Supreme Court did not apply the rule of *Shelley v. Kramer*, then it would find some other rule. Quite recently we had a situation in which a city considered it was legally obligated to give equal privileges to Negroes in a large municipal recreation park. As they did not wish to do this, they leased the park to a private corporation which, being private, they thought, could make its own rules as to segregation. Even as the decided cases go now, I should think it clear that the scheme, besides being ill-advised, is doomed to failure; but were none of these cases on record, an intelligent house counsel alongside of the times would tell the leasing corporation that the thing could not be done. In larger aspect, the handling of the relations between the corporation and its industry and the community represented by some branch of government, becomes matter of extreme importance. The independent lawyer is commonly asked what the law now is. The house counsel, as a member of the organization, has to ask himself also what the law is likely to

be a few years from now. Indeed he may very well find himself in the position of insisting that his corporation support legislation removing plainly governmental decisions—such as that of refusing employment or blacklisting men from their chosen profession—from corporate choice altogether.

Congressman Emanuel Celler, at present Chairman of the extremely powerful House Judiciary Committee, has been turning over in his mind the possibility of a carefully drawn economic civil rights act laying down in limited fields certain precise functions really penal in character which a corporation ought not to have to exercise and which could and should be referred to federal or state authorities. It is an idea which deserves support of the corporate world. Corporations find it unpleasant to be governed by the political state, and rightly so. But if corporations attempt at the same time to govern in any respect, they probably would find their situation still more unpleasant.

A second point of emphasis is the new position of corporate management, beginning to be recognized even in courts of law. Briefly, we are on the threshold of a period in which corporation managements will not be allowed to exist unless they attain at least minimal standards of responsibility. The doctrine will be applied by courts unless legislation intervenes. How it is applied, of course, will be determined by the circumstances in which the problem happens to be presented.

You can take off from the New York case of *Gerdes v. Reynolds* in which another law professor, my old friend, John Gerdes of New York University, found himself trustee of a dying investment company. The controlling stockholders sold a majority of the voting stock to undisclosed purchasers through a brokerage house and simultaneously resigned their directorships. The incoming interests promptly filled the vacancies, and equally promptly looted the corporation. Gerdes brought action against the owners-directors for waste of the corporate assets. The theory was that by thus selling out and resigning they had left the corporate heritage undefended and uncared for, in that they had not made reasonable inquiry as to the character of the incoming management. Justice Walter in the New York Supreme Court

(28 NYS 2d 622) found a basis of liability. He had to struggle to do it, and stretched the well-known doctrine that directors must not sell their resignations—in this case finding that an excessive purchase price for their stock really amounted to sale of directoral power. The judicial reasoning really goes to the point that in this day and age an outgoing management is at least obliged to satisfy itself that an incoming management is at least minimally responsible.

Dean Wallace Donham of the Harvard University Business School had made this point a matter of business ethics nearly thirty years previously and, as always, an established doctrine of business ethics is pretty likely to find its way into the law within a generation. A number of situations obliquely raising the point have come up since. As of now, this is the real point at issue in some of the litigation brought in connection with stockholders' contests for control. For example, litigation is currently prevailing between the Wolfson interests and the Avery management in Montgomery Ward & Company in the courts of Illinois. Though the precise question is an interpretation of the Illinois Constitution and the Illinois statutes, the briefs make it clear that the real thrust of the Avery contentions is that the challenging faction desires not to manage the corporation but to get control of its large assets. The technical point is being weighted by a secondary point perhaps less established in the law but designed to affect the result. Other similar litigations suggest such emergence of the same factor in other technical connections.

As always in common law, the *ratio decidendi* is confined to a narrow point. But the combined economic, social and moral forces that impel courts to seek technical basis for deciding a case are all there. If we are right in believing that a corporation is, or is capable of becoming a quasi-public institution, and that our economic system and our legal permissions allow it to propose itself for that role, there should be no surprise in discovering that at least minimal standards for service in that category are beginning to be imposed. The outgoing Superintendent of Banks of the State of New York indeed suggested that by legislation the character of controlling interest in banks should be subjected to

minimal standards. But does anyone really deny that the community can be just as thoroughly damaged by an irresponsible management in a key industry as in banking? The damage may not be quite as immediate or quite as dramatic, but it can be no less great. For that matter on the edge of the law we have had the controversy over the management of Follansbee Steel Company in which the real issue was whether a management was justified in making a sale of its business with the result that a community might be deprived of its livelihood; and a like controversy over Textron, Inc., in Nashua, New Hampshire; and a number of similar peripheral problems.

In other words, an area of controversy is presented in which, first, the quality of the men who are to undertake the corporate responsibilities, and, second, the kind of responsibilities they have, are beginning to reach the courts in one form or another.

Now these problems are not solved effectively by the occasional case or controversy which reaches judicial decision. Factually the situations themselves can only be resolved by advance knowledge of the standards and criteria imposed and by the adoption by management of policies which will meet or satisfy these tests. To do this requires counsel who do not resort to the familiar lawyer's escape hatch, and decline to advise on "business policy," confining themselves to statements of decided law.

At this place, we revert to the place or point of beginning, as the old deeds say. The house counsel of the corporation is the one law officer who does see policy in evolution, and he can offer guidance. The ambit of his operation is rather larger than the advocate or counsellor called in for an *ad hoc* opinion or for defense. His business is not only to know the law, but to be aware of the forces which make law a few years hence. This is his job. Like the clerk or priest in the old feudal court, he is both of the process and able to express a detached point of view. If in doing this he suffers some of the dangers that attended the early priests who imported equity into the English common law he also has satisfaction in knowing himself to be a powerful influence in the growth of this strange and revolutionary system America is in process of creating.

The American Legal System*—A Review

By THE HONORABLE SAMUEL C. COLEMAN

This is an ambitious enterprise. The author, for many years professor of law at the College of the City of New York (to college undergraduates), has embarked on a very comprehensive venture: An attempt to present in one volume a complete account of our legal system;—its structure, its institutions, their growth and development, with a critical analysis of them. And he accomplishes his purpose well. The work is intended principally for students not going into law, although the author does not suggest that law students and, indeed, lawyers may not find it helpful.

In his introduction, Professor Mayers observes that knowledge of our legal system beyond our own shores is fragmentary, and he refers to a comment of a British jurist on the complexity of our system. I may add an observation of my own of a year or so ago when, in speaking to an outstanding British law officer, I found him surprised to learn that we, too, talk of writs *ne exeat*; and to go farther afield, my own experience with audiences of French and Italian students of law has shown me how little is known in those countries about our legal system. But the book is addressed to American college students and the general reader. Is such a work needful?

It is significant that at the present time there is a lively discussion in our universities on the subject of the teaching of law in the liberal arts colleges. Last winter a conference on the subject was held at the Harvard Law School; its results were summarized by Professor Berman of Harvard in the Harvard Law School Bulletin of February of this year. He puts the question as follows:

"An increasing number of educators, both in the law schools and in colleges and universities generally, are troubled by the fact that the study of law has become virtually a professional monopoly, and that students of the social sciences and the humanities—future businessmen, administrators, doctors, teachers, and other non-lawyers—are scarcely introduced to what is certainly one of the great traditions of Western thought and action, one of the most important elements of our social order, and one of the fundamental aspects of human behavior and human psychology."

The problem, of course, is not to inculcate into "non-students" of the law a dogmatic knowledge of our law, but to introduce them to basic notions of justice, of right and wrong that are at the bottom of dogma, with enough understanding of the administrative processes of the law to enable them to

* Mayers, Lewis, *American Legal System*; the administration of justice in the United States by judicial, administrative, military and arbitral tribunals. 589pp. \$6.50. 1955. Harper and Bros.

appreciate how these notions are applied and whether they function adequately.

The conference disclosed differences of opinion as to the content of courses outside the law school suitable for the purposes in mind and as to the materials to be used. However those differences are resolved,—if indeed they are,—it seems to me that there should be agreement that the matter covered by Professor Mayers somehow must be incorporated in any course that may be planned. The book deals with the organization of our courts, the respective jurisdictions of state and federal courts, their overlapping and the special position of the Supreme Court, with adequate generalized treatment on procedure in civil and criminal cases. The presentation on procedure is especially valuable in the field of criminal law, where procedural steps are so fundamental in the preservation of the rights of the individual. And so, in this respect, the book deals with problems of arrest, bail, self-incrimination, privilege, proceedings before a grand jury;—all in simple non-technical language.

Enough history is given to present the growth and development of these institutions for the protection of the individual, but the day-by-day problems of court functioning, including problems involving the selection of judges, are not omitted. The growth of administrative agencies and their position in the order of tribunals are presented; even military courts and their procedures are discussed. The scope is staggering, but it is competently encompassed. The author would undoubtedly be the last one to say that many of the ideas expressed have not been projected and discussed in university forums and elsewhere. The real value of the book lies in bringing all these various matters together in one volume, interestingly and succinctly.

Recent Decisions of the United States Supreme Court

By ROBERT B. VON MEHREN and JOSEPH BARBASH

GRANVILLE-SMITH V. GRANVILLE-SMITH

(April 11, 1955)

In this case the Supreme Court holds that the Virgin Islands has not been permitted by Congress to do what Nevada has, for most practical purposes, been permitted to do, *i.e.* grant a divorce in the absence of domicile.

The United States acquired the Virgin Islands from Denmark in 1917. In 1936 Congress provided a complete government for the Islands and gave its Legislative Assembly power to enact laws on "all subjects of local application not inconsistent with . . . this title or the laws of the United States made applicable to said islands . . ." Organic Act of 1936, 48 U.S.C. §1405f.

Pursuant to this authority, the Legislative Assembly in 1953 enacted Section 9(a) of the Islands' divorce law which provides that:

" . . . if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."

The instant case arose when Mrs. Granville-Smith, the petitioner in the Supreme Court, filed suit in the District Court of the Virgin Islands for divorce because of "irreconcilable incompatibility." Mr. Granville-Smith entered an appearance, waived personal service, denied the allegations of the complaint and consented to the entry of such findings of fact and conclusions of law as the Court might deem just and reasonable. Mrs. Granville-Smith testified before a Commissioner that she had resided in the Virgin Islands continuously for forty-three days before bringing suit. On this ground alone the Commissioner found that she was a resident and an inhabitant of the Islands and had been so for more than six weeks prior to the action. He also found that the claimed ground for divorce was substantiated and recommended that a divorce be granted. The District Court, however, refused to confirm the Commissioner's recommendation. It held that domicile had not been established and that the complaint should be dismissed for want of jurisdiction over Mrs. Granville-Smith.

On appeal the Court of Appeals for the Third Circuit, sitting *en banc*, affirmed on the basis of its decision in *Alton v. Alton*. 207 F. 2d 667 (1953).

The Supreme Court granted certiorari, as it had in the *Alton* case, which, however, had become moot prior to argument.

The Supreme Court affirmed the lower courts 5-3, Mr. Justice Harlan not participating. The opinion of the Court, written by Mr. Justice Frankfurter, did not decide any of the constitutional questions argued. Its holding is narrow:—"that Congress did not give the Virgin Islands Legislative Assembly power to enact a law with the radiations of §9(a)." It based its holding on the Organic Act of 1936 and, in particular, the phrase "all subjects of local application."

That phrase appears, the majority emphasizes, only in organic legislation affecting *unincorporated* territories such as the Virgin Islands. The legislative power of *incorporated* territories, on the other hand, has customarily been expressed as extending to "all rightful subjects of legislation." The substitution of the phrase "local application" for the word "legislation," the majority argues, "obviously implies limitation to subjects having relevant ties within the territory, to laws growing out of the needs of the Islands and governing relations with them." Therefore, the decisive question is whether Section 9(a) was concerned with the needs and interests of the local population of the Virgin Islands or was "designed for export."

The majority attempts to demonstrate in two ways that Section 9(a) was "designed for export." First, they point out that the presumption of domicile after six weeks' continuous residence would be of no practical importance to one living in the Islands on a permanent basis; second, they analyze statistics tending to show that a high percentage of Virgin Island divorces are granted to litigants from the mainland.

Mr. Justice Clark dissented, joined by Justices Black and Reed. The dissenters construe the Organic Act of 1936 to give the Legislative Assembly the power to enact legislation such as Section 9(a). They can find nothing in the relevant legislative history indicating that the phrase "subjects of local application" was intended by Congress to operate as a limitation. They believe that it was intended to mean nothing more and nothing less than the phrase "all rightful subjects of legislation." It is their conclusion that Congress authorized the Virgin Islands "to have the power of a State" in the area of divorce "and thought no more about it."

Since the dissenters did not take the road of statutory construction, they had to consider the constitutional issues which had been raised. These issues involved the Due Process Clause of the Fifth Amendment, the Full Faith and Credit Clause and the Tenth Amendment and appear for the most part to be similar to the issues which would have been presented if a Nevada divorce had been before the Court. All were shortly disposed of. Neither of the Granville-Smiths had claimed that "they had been deprived of life, liberty, or property without due process of law," and the interest of the state in the marital relationship does not come within the protection of the Due Process Clause. No full faith and credit question was raised because Mrs. Granville-Smith was not asking that the Supreme Court make her divorce, if granted, valid in the States. Finally, the Tenth Amendment is inapplicable because that amendment does not operate as a limitation upon the exer-

cise of those powers, express or implied, delegated to the national government.

Without a careful study of the relevant legislative history, it is difficult to evaluate opinions which turn upon the construction of a statute. On the basis of the legislative history set forth in the majority and minority opinions, however, it may be said that the majority's conclusion is subject to considerable doubt. The dissenters are probably correct when they claim that Congress, while it never considered the particular question presented here, intended that the Virgin Islands should have the same powers with respect to divorce as the States.

Political consideration may make it impossible for Congress to confer expressly upon the Virgin Islands now what it may have intended to confer earlier in a general grant of legislative authority. Thus by avoiding the constitutional questions raised in this case, the Court will probably be relieved of deciding them in proceedings involving territories. Moreover, unless Nevada judges follow the example of their Island Bretheren, it is extremely doubtful that the Court will be given an opportunity in a State proceeding to decide whether due process requires domicile for divorce jurisdiction where the defendant has entered an appearance.

REGAN V. THE PEOPLE OF THE STATE OF NEW YORK

(April 25, 1955)

The State of New York grants immunity against prosecution to persons compelled to testify against themselves in relation to bribery. New York City, pursuant to a provision in its charter, will fire any City employee who refuses to sign a waiver of such immunity to prosecutions on matters of an "official nature."

Regan, a New York City policeman called to testify before a grand jury examining into official bribery, signed a waiver of immunity. Before testifying, however, his relationship to the police force was "severed." When asked whether he had accepted bribes while he was a policeman, he refused to answer on the ground of possible self-incrimination. His waiver was invalid, he asserted, because he had not understood its significance. The County Court of Kings County held the waiver valid and ordered him to testify. He again refused. He was tried for criminal contempt and convicted, and the conviction was affirmed by the Appellate Division and the Court of Appeals.

The Supreme Court granted certiorari and affirmed the judgment below, 6 to 2, Mr. Justice Harlan not participating.

Although Mr. Justice Reed was joined by only Justices Burton and Minton, his opinion states that it is "the opinion of the Court." The decision turns on the fact that New York has an immunity statute applicable to Regan and that such statutes are constitutional. *Brown v. Walker*, 161 U.S. 591 (1896). Thus if Regan had not executed a waiver of immunity, he could constitutionally be compelled to testify, for his testimony then "could not possibly have been self-incriminatory." His execution of a waiver, valid or

invalid, does not alter the situation. If the waiver is valid, Regan could be liable to prosecution both for contempt and bribery, and this "would be simply the result of a voluntary choice to waive an immunity provided by the State." On the other hand, if the waiver is invalid, Regan's immunity from prosecution continues and his testimony "could not possibly be incriminatory." In short, the invalidity of the waiver may be a defense to subsequent prosecution based on the testimony, but it "is no defense to a refusal to testify."

Having decided that Regan must lose whether the case be black or white, the opinion held finally that he could not assert that it was gray. The opinion recognized that uncertainty as to whether or not there could be a prosecution for bribery might, as a matter of State law, be a defense to an indictment for criminal contempt. But here Regan should have known that he was legally obliged to testify, no matter how the question of the waiver's validity were resolved. Therefore, the Fourteenth Amendment cannot excuse his failure to testify after having been so directed.

The Chief Justice, joined by Mr. Justice Clark, concurred "in the judgment of the Court..". He agreed with Justice Reed's opinion that, when there is an immunity statute, even an invalid waiver could not "relieve" Regan "from the duty of every citizen to testify." He concurred, however, in order to make two caveats. First, he noted that in the absence of an adequate immunity statute, it has never been held that a State "can punish a witness for contempt for refusing to answer self-incriminatory questions." Second, the Chief Justice warned that if Regan were forced to testify at a subsequent hearing and then were convicted on the basis of his testimony, the Court might hold the conviction invalid on any of three grounds: (a) that "coercion in the procurement of the waiver" deprived Regan of his federal right against compulsory self-incrimination; (b) that use of the waiver "well beyond the term of petitioner's public employment" unreasonably interfered with this federal right; or (c) that if the State both deprives Regan of his job and sends him to the penitentiary for bribery, the uniformity requirements of the equal protection clause of the Fourteenth Amendment may be violated.

Mr. Justice Frankfurter concurred in the majority's result without opinion.

Mr. Justice Black, joined by Mr. Justice Douglas, dissented. First, Justice Black would hold that regardless of whether (as he continues to maintain) the Fourteenth Amendment adopts the Fifth Amendment in toto, a State may not compel a person to testify against himself on pain of punishment for contempt, at least in the absence of an immunity statute. And, although he appears to concede that an immunity statute is not unconstitutional in itself, he would hold unconstitutional the "waiver device" as used here, for it bargains "away far in advance of the day when needed" a safeguard "against the overreaching power of government." Furthermore, Justice Black maintains, in situations like Regan's the waiver cannot be thought voluntary, for otherwise the Federal Government would now be free to "compel its millions of employees permanently to waive their privilege

against self-incrimination or lose their jobs" and private employers might be "now free to compel their employees to waive this and other constitutional privileges."

Viewed as a logical deduction from established constitutional principles, the majority's decision seems unquestionable. However, it invites, as Justice Black points out, extensive use of the waiver technique. Moreover, it leaves undecided the question that will inevitably arise in any prosecution for the substantive crime when there has been a waiver of immunity—whether a waiver is "coerced" when an employee's only alternative is loss of his job. Indeed, it is not even clear whether "coercion" of a waiver raises a federal constitutional question or merely involves a question of contract law.

Perhaps the only constitutional escape from making a *Regan's* choice harder than *Hobson's* would be to reconsider and overrule *Brown v. Walker*. That case was decided and has been followed because the Court has believed the grant of immunity to be a useful and fair technique for obtaining testimony without violating the spirit of the constitutional privilege against self-incrimination. If the States, the Federal Government and private employers should now use the waiver device so as to make the statute-conferred immunities wholly illusory, the Court may well conclude that the immunity statutes themselves no longer justify an exception to the privilege. Or it may, as Chief Justice Warren suggests, construct some constitutional restrictions upon the waiver itself. For the present, it seems that defendants would be well advised to testify and not to test the waiver until any subsequent trial for the substantive offense.

Recent Decisions of the New York Court of Appeals

By SHELDON OLIENSIS and JOSEPH H. FLOM

APRIL PRODUCTIONS, INC. V. G. SCHIRMER, INC.

(308 N.Y. 366, April 14, 1955)

In August, 1917, Shubert Theatrical Company, plaintiff's assignor, acquired certain rights in the music of a musical play, "Maytime." In a letter agreement, dated September 14, 1917, Shubert turned over to defendant, a music publisher, publication and mechanical rights in the music. Under the agreement, defendant agreed to pay specified royalties. The agreement was not expressly limited in time, nor did it contain any mention of copyright.

In accordance with trade custom, defendant copyrighted the compositions in its own name and continued to publish them and pay royalties until 1945, when the original 28-year term of copyright expired. The renewal copyright was secured by the composer and by the lyricist's executor. Defendant did not apply for a renewal since, under the Copyright Act, only the authors or their statutory successors could do so. Defendant then entered into new contracts for the renewal term directly with the authors, ceased paying royalties to plaintiff and commenced paying royalties to the authors.

Plaintiff brought this action, contending that defendant's obligation to pay royalties under the 1917 contract continued indefinitely, without regard to copyright or copyright term. The trial court rendered a judgment for plaintiff for all royalties accrued since 1945; the Appellate Division, First Department, affirmed, 3 to 2. The Court of Appeals, dividing 4 to 3, reversed and dismissed the complaint in an opinion by Judge Fuld.

The majority pointed out that the effect of the lower court's decision was to require defendant to pay royalties for the same privilege both to the owners of the renewal copyright and to plaintiff, even though plaintiff's right to control publication of the works expired in 1945. Moreover, even after the expiration of the renewal copyright in 1973, when the compositions would fall into the public domain, defendant would still have to pay royalties to plaintiff.

However, the majority ruled, a "careful reading of the contract" revealed the parties' intention to require royalty payments only so long as Shubert secured to defendant the right to publish the music, despite the absence of any express statement to that effect. The Court noted that Shubert had the power to grant authorization to publish only for the term of the underlying copyrights; moreover, payment was not to be made in a lump sum or in specified installments, but was geared exclusively to the publication of the compositions. The Court also referred to patent cases which establish the

presumption that royalties are not to be paid after the expiration of the term of the patent.

The Court recognized that its task was made more difficult because the contract nowhere used the term "copyright" and Shubert had no copyright on the songs. The Court found help, however, in the fact that Shubert's contract with the owner of the original play spoke in terms of copyright. In addition, but for the anticipated protection afforded by a copyright, Shubert would have had nothing of value to sell.

The majority felt that, realistically, the contract was therefore necessarily made in contemplation of defendant's securing copyrights. Thus, the cases which terminated the obligation to pay royalties upon the expiration of the copyright were applicable.

The three dissenting judges, in an opinion by Judge Desmond, argued that the contract should be construed as written and that "an attempt by us to write new terms into it is unwarranted and gratuitous." The dissent stressed the absence of any reference to copyright in the agreement. The cases construing contracts in which a copyright or patent owner had issued a license thereunder were, the dissenters felt, inapplicable since Shubert never owned a copyright on the compositions. Although recognizing that the problem arose because of the parties' failure to foresee the long continued popularity of the compositions, the dissent concluded that the parties must be left to the terms of the original contract.

The case is interesting both as a demonstration of judicial techniques in construing contracts so as to cover unforeseen situations and, substantively, as a substantial extension of the doctrine that copyright licensing agreements terminate with the expiration of the term of the copyright. However, in view of the close division of the Court, and the majority's reliance in part on certain specific facts in this case, draftsmen of contracts covering copyrightable or patentable matter would be well advised to provide expressly for termination of such agreements once the protection afforded by them expires. The case demonstrates that the subject matter of such a contract may long outlast the most optimistic expectations of the parties.

Committee Report

COMMITTEE ON FOREIGN LAW

AMERICAN JUDGMENTS ABROAD

VICTORIA

The Committee's report is based on communications from Professor David P. Derham, Professor of Jurisprudence, University of Melbourne Law School, and a memorandum by P. A. Wilson, Esq. of the Victoria Bar. The law in Victoria relating to the enforcement of foreign judgments is substantially the same as English law except that the Victorian legislature has not passed acts similar to the Foreign Judgments (Reciprocal Enforcement) Act 1933, the Arbitration (Foreign Awards) Act 1930, and the Arbitration Clauses (Protocol) Act of 1924 of the United Kingdom. Reference is accordingly made to the Report on English law, printed in *THE RECORD*, November 1954, p. 391 *seq.*, and the present report is a condensation of the memoranda of Professor Derham and Mr. Wilson.

1. Reciprocity is not required by the Victorian courts in proceedings to enforce foreign judgments.

2. Proceedings may always be brought in the Supreme Court. The County Court has jurisdiction where the amount sought to be recovered is not more than £1000, notwithstanding that the cause of action arose outside Victoria provided that the defendant resided within Victoria at the time of the service of the summons upon him (County Court Act 1928, sec. 361). Courts of Petty Sessions do not appear to have any jurisdiction to hear actions on foreign judgments; at least it would be difficult to convince a Court of Petty Sessions that it had jurisdiction. In practice, the proceedings are always brought in the Supreme Court.

If the plaintiff resides outside the jurisdiction he may be ordered to give security for costs and until he does so his action will be stayed (Rules of Supreme Court O.LXV r. 6 A. County Court Rules O.1. r. 4).

The costs of registering a foreign judgment to be subsequently enforced, where the registration and the enforcement were not contested would be under £50. The cost would be the same or at least very little more where judgment is obtained in a suit based on a foreign judgment by default proceedings on a specially endorsed writ. These proceedings permit of judgments being entered very speedily unless there is a defense necessitating a trial. A contested case would involve much higher costs to the unsuccessful party, £300 or more, depending on the duration of the proceedings.

3. Foreign judgments may be proved by examined or authenticated copies

Editor's Note: This Report was prepared for the Committee by Phanor J. Eder.

(*Motteram v. Eastern Counties Rail Co.* (1859) 7 C.B. (NS) 58, 71). An examined copy is a copy of a document which a witness swears he has compared with the original or with what the officer of the Court which has custody of the original or any other person read as the contents of the original and which copy the witness swears is correct. An authenticated copy must purport either to be sealed with the seal of the Court to which the original document belongs or if the Court has no seal to be signed by the Judge or one of the Judges of the Court who must attach to his signature a statement on the copy that the Court has no seal (Evidence Act 1928, sec. 47). Consular certification is neither necessary nor of any value.

4. It need not be expressly alleged in the Plaintiff's Statement of Claim that the foreign Court had jurisdiction over the parties or the cause, but it is usual to do so (Bullen & Leake, *Precedents of Pleadings*, 9th ed., p. 214). The jurisdictional facts will be assumed until the contrary is made to appear, and do not have to appear in the record.

5. The court will not enquire as to the merits of the controversy. A valid foreign judgment is conclusive as to any matter thereby adjudicated and cannot be impeached for any error either of fact or of law.

6. The defense of fraud in obtaining the judgment is permissible.

7. The judgment must be final and conclusive. It must be shown that in the Court by which it was pronounced, it conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive evidence in Victoria so as to make it *res judicata* between the parties. The burden of establishing finality is on the plaintiff and it will not be presumed in his favour.

8. A default judgment rendered on personal service will be enforced but not a judgment on substituted service even though permissible under New York law.

The doctrine that the judgment must be responsive to the pleadings is not applicable in Victoria. The point has never been decided in an English or Australian court, but in *Jack v. Tease* (12 I.R. Ch. R. 279), it was held that a defect in pleadings in the Supreme Court of New South Wales did not prevent the successful plaintiff in that court from enforcing his judgment in Ireland (See also Read: Recognition and Enforcement of Foreign Judgments 92-93, consistent with the decision in *Godard v. Gray* (L.R. 6 Q.B. 139) in which it was held that notwithstanding that a mistake in English law was apparent on the face of the record of the French proceedings, the English court could not reopen the dispute on the merits. The dictum of Chapman J. in *Larnack v. Alleyne* (W. & W. (E.) 342 (1862)) to the contrary would not be followed today.

9. The creditor may sue either on the original claim or on the judgment. Since a valid foreign judgment cannot be impeached, a set-off, in so far as it would have been a defense to the original cause of action if pleaded, cannot be pleaded as a defence to an action on the judgment. A counterclaim, however, being a cross action on a different cause of action, may be brought against a plaintiff suing on a foreign judgment, and the Court may

deal with it though not connected with or of the same character as the claim (Jacobs, *County Court Practice*, 4th ed. p. 264; Bullen & Leake, *op. cit.* pp. 552-559; Rules Supreme Court, O.19 r. 3; County Court Rules, O.11, r. 2.) Moreover, if the plaintiff fails and the defendant succeeds on his counterclaim, the plaintiff will have submitted to the jurisdiction of the Victorian courts, the judgment of which will then have international validity for the purpose of extra-territorial enforcement.

10. Judgments will be enforced against citizens as well as against foreigners.

11. Pursuant to sec. 29 of the Banking Act 1945-1953 and the Banking (Foreign Exchange) Regulations (Consolidated Reprint 1933 (1945 as amended), in particular Regs. 8 and 11), approval to remit the proceeds of judgments to the United States must be obtained from the Commonwealth Bank of Australia. Applications are dealt with administratively, each application being considered on its merits and in the light of the Commonwealth's overall dollar position. Approval is not a condition precedent to the recovery of judgments or execution thereon, but the Bank has indicated that it is prepared to advise whether approval will be granted or refused in particular cases before proceedings are commenced.

12. The Victorian Supreme Court Act 1928 (secs. 179-195) contains provisions enabling judgments of courts in the United Kingdom and other British Dominions to be registered and enforced in Victoria; in some respects New Zealand is in a specially favourable position (County Court Act 1928, s. 78). To this extent United States judgments receive less favorable treatment. Also a contested law suit in Victoria may take six to eighteen months to be reached in the law list for hearing.

13. No precise figures are available as to the number of foreign judgments sued on, but according to the Prothonotary's office not more than half a dozen foreign judgments are dealt with each year, and of these only one or two would originate in the U.S.A. The Deputy Prothonotary advises that no U.S. judgments have been refused recognition.

ARBITRAL AWARDS

1. A foreign arbitration award has no direct operation in Victoria, but if it fulfills the conditions requisite for the validity of a foreign judgment it may be enforced by an action at the discretion of the Court (Dicey, *Conflict of Laws*, 6th ed. p. 433; *Norske Atlas Ins. Co. v. London, etc. Ins. Co* (1927) 43 T.L.R. 541). In *Merrifield Ziegler & Co. v. Liverpool Cotton Association* (1911) 105 L.T. 97, it was decided that an award validly made in Germany which required a court order to be enforced could not be enforced in England by action on the award in the absence of such an order.

2. No distinction is made between ordinary judgments and judgments entered pursuant to an arbitral award.

3. An award duly rendered under New York law against a party who has failed to appoint an arbitrator or who has attempted to withdraw from

the arbitration will be enforced if it fulfills the conditions requisite for the validity of a foreign judgment. If there is an express submission to arbitration in New York either in a commercial contract or *a fortiori* in a deed of submission, there should be little difficulty in enforcing the New York award in Victoria.

CONCLUSION

The Committee's conclusions, in respect of Great Britain and New Zealand (*THE RECORD, supra*, pp. 397, 399) are applicable to Victoria, viz: that the situation of American judgment-creditors is satisfactory and that little, if anything (other than a slight reduction in costs) would be gained by a treaty. As to arbitral awards, the Committee would recommend, as a practical matter though not legally essential, that they be reduced to judgment to facilitate enforcement abroad.

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RECENT SELECTED LITERATURE ON CRIME AND PUNISHMENT

"Children have more need of models than of critics."

JOUBERT

During the second week of May, 1955, some one hundred judges, probationary officers, court case workers and others met in conference at the House of The Association of the Bar of the City of New York to discuss the many and almost insurmountable problems dealing in crime, criminal laws of the various states, the law of criminal punishment, and psychological and psychiatric aspects of jurisprudence. While they were concerned whether the crime fits the punishment or the punishment fits the crime, the deeper issue was with remedial steps to mitigate crime in the first instance.

Other problems on the agenda for discussion were the non-uniformity of law in several states relating to crime, of punishments for crime, the discretionary powers of judges, the variation of sentencing, the lack of sufficient and properly trained personnel and functionaries of the courts and probation offices, and the terrifying increase of juvenile crime and misdemeanor. Freedom and responsibility together with many other aspects of society's failure of proper maintenance of law and order were considered. These must be summarily dealt with and are in need of immediate dispatch.

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